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“Do-Not-Call List” TESTIMONY
BEFORE THE SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION*

TESTIMONY BY: TIM SEARCY**

SEPTEMBER 30, 2003

Senators, thank you for giving me this opportunity to testify before you today, on a matter of great importance to U.S. consumers, and business alike: the formation of a federal Do Not Call Registry. I am the Executive Director of the American Teleservices Association, which is the largest and only association dedicated exclusively to the interests of the teleservices industry. We are enjoying our twentieth anniversary this year, and represent approximately 650 firms involved in the teleservices industry. Our membership is tremendously diverse, and encompasses all aspects of telemarketing, customer service, market research, political calling, non-profit fundraising and technical product support. We also represent the firms that provide long distance, equipment providers, outsourced teleservices firms, consultants and in-house teleservices operations like banks, major retailers, cable television, local telephone service, etc.

As elected officials, I am certain you know how difficult it is to get a complete message delivered in a sound bite through the media. For that reason, at times the ATA's opposition to the Do Not Call Registry has been mischaracterized, and I truly appreciate the opportunity to set the record straight. Of course, my recent time in the media limelight has not improved my self esteem, as I was recently told by a Bloomberg reporter that I had become America's Pinata.

Setting the Record Straight

Since the inception of the FTC's Telemarketing Sales Rule and the FCC's Telephone Consumer Protection Act, over a decade ago, the ATA has worked with its members to educate them on issues related to compliance with federal laws. Additionally, we are often the source for understanding the many state laws that impact our member's business interests.

Teleservices enjoys a unique role in providing competition in the U.S. marketplace for goods and services. When the break up of the long distance monopoly occurred, it was teleservices that lead the way in rapidly opening the marketplace to lower priced alternatives. When cable television moved from its infancy, teleservices was one of the main advertising mediums that delivered the benefits of more channel selection to US consumers. The recent boom of refinancing in the home mortgage arena can in part give thanks to teleservices for spreading the competitive message quickly, and cost effectively to millions of consumers throughout the United States.

Teleservices provides entrepreneurs and new market entrants alike, the opportunity to compete effectively against entrenched incumbents. Everyone recognizes that advertising is an embedded cost in the price of a product. Therefore it is logical that lower cost marketing alternatives would also yield lower prices for consumers. In an increasingly challenged economy, and with advertising costs escalating, lower cost marketing alternatives like teleservices have greatly

increased over the last few years. But more importantly, our industry has grown because it is extremely effective. If consumers were not purchasing, we would not be calling, nor be here today.

Indeed, the current marketplace coupled with the decreasing cost of long distance, have created a situation under which Americans are experiencing more calls now than in the past. However, it is important to remember that all forms of traditional and alternative advertising have experienced similar growth, as companies struggle to bring products to market, and continually develop creative means to do so.

In addition to consumer choice and competition, teleservices has also provided jobs. In the U.S. today, 6.5 million people make a living either making to or taking phone calls from U.S. consumers. Although we know that not all jobs in our industry are concerned with calling consumers at home, we know that the symbiotic nature of teleservices means that every employee in our industry is impacted by legislation and regulation. Mr. Chairman, in your home state it has been reported that 126,000 men and women make all or part of their living on the telephone. We know that individuals employed by our industry will be hard pressed to find alternative employment if the volume of calls were to be significantly decreased by a national Do Not Call Registry.

We employ primarily ethnic minorities, the physically handicapped, single mothers, students, seniors, disabled combat veterans and others that are not likely to quickly find gainful employment somewhere else. By our estimate, two million people will lose their jobs if federal DNC list is enforced.

Teleservices is a pervasive channel of marketing in the United States, and it has been difficult for government agencies to use arcane business classifications to get a handle on the appropriate size of our business. But it only makes sense that you must include everyone that makes phone calls to consumers as a primary form of marketing in the projected impact. If you examine the people that use teleservices, it is all of our neighbors, not just the big call centers shown in newspaper pictures. The people that will be decimated by these regulations are also the real estate agent seeking new listings, the insurance agent calling the client referral, or even the local handyman looking to fix your gutters.

Certainly, the large outsourced call centers make up an important fraction of our business, and account for 7-8% of the industry, but the rest of the industry is made up of employees that would not be classified as telemarketers, but as bank employees, insurance agents, cable representatives and the like. The immediate impact is two million jobs lost of the 6.5 million people employed in the industry, but the downstream impact would be much greater. Imagine how our fragile economy will react to much higher unemployment, the loss of tax revenue, and the inability of consumers to afford to purchase goods and services. Even a percentage of the impact we anticipate could be crippling to our economy.

Constitutionality

In terms of ATA's federal case, we have always strongly believed that there are important constitutional issues to be considered as we contemplate the federal government's involvement in the teleservices industry. I believe that experts are in attendance today that are equipped to address this issue, so I will only state the ATA's position as a matter for the record. We believe that both the FTC and FCC promulgated rules that are unconstitutional because they unfairly restrict legitimate commercial speech, and seek to make a distinction between two kinds of speech. In essence, because a ringing phone cannot distinguish who is calling, when the federal government restricts who the appropriate caller is, and the content of the message, it violates the First Amendment. By including the exemption for charities and politicians, the FTC and FCC have created two classes of speech, which history tells us is clearly unconstitutional.

What does this mean?

Despite the extraordinary benefits that teleservices provides, and the clear constitutional considerations, the last year has been a flurry of regulation, litigation and now legislation and further litigation. In advance of federal action, we already had thirty-seven state Do Not Call Registry laws that come in a wide variety of shapes and sizes. It is not surprising that the regulatory and legislative bodies have tried to craft policy to address the legitimate needs of consumers. Unfortunately, an unconstitutional and one-size-fits-all approach is not the answer.

For a long time, the ATA as the voice of industry has attempted to engage proper regulatory agencies and other policy makers to find the appropriate means to address consumer and business interests. Our comments to the FTC and FCC have been ignored. Even more importantly, the Congressional requirements for an economic impact study, including the potential effects on small business of new regulations, and the necessary regulatory paperwork assessments have also been ignored. In a rush to judgment, the regulatory agencies have pushed through the kind of policy that creates confusion without true relief.

The current standings in court have also created confusion for all parties involved. The FTC has a list that it continues to take names for, although a federal judge has deemed that unconstitutional. The FCC was prepared to enforce with fines, based on a list that the same judge ruled was unconstitutional. Fortunately, Judge Nottingham further clarified his ruling in response to an FTC request for a 'stay,' and has again made it clear that the FCC is not to use the FTC list for the purpose of enforcement. Again the court has made it clear that neither direct or indirect violation of the U.S. Constitution will be allowed.

Operational problems with the list

Additionally, there are numerous operational problems with the list. Not only is the list prone to fraudulent additions of phone numbers from people without legal authority, it lacks fundamental verification allowing for abuse as well. Although it is easy to get on the list, enforcement agencies have made little to no provision for interested individuals to take their names off the list. Clear enforcement guidelines and standards have not been communicated to the state agencies that are required to participate to make the list effective. If that is not enough, because no cellular database exists, as well as no national disconnect database, it is virtually impossible

to keep the list current and accurate. As the Eagles' song says, "You can check in any time you like, but you can never leave." For a list supposedly designed to provide citizens with choice, the ultimate choice to 'opt out' is effectively denied to them.

Enforcement of current law

The ATA strongly believes that much of the current situation could have been avoided. The original rules were designed to address concerns arising from fraud and abuse. At no point has this argument been about fraud or abuse, but rather it has centered on convenience. We have heard from time to time that seniors are disproportionately targeted for fraudulent offers, or that teleservices is full of scams. In all recorded cases, legitimate teleservices providers are not the perpetrators of the crimes described. In fact, we are in active support of the original intent of the TSR and TCPA in their efforts to eliminate fraud. We continue to provide assistance to state law enforcement agencies whenever possible to identify the bad actors that use the telephone, and bring them to justice.

A welcome addition to the body of regulations that were originally promulgated dealt with company specific do-not-call lists. Current law requires that every firm create a list of individuals that do not want to be called by that company. If a company violated that law, suits could be filed by the individual, and collected fines would be returned to the consumer. This proved to be effective when used. However, both regulations about fraud, and regulations about the company specific rule have failed to receive proper education, and proper enforcement resources. Therefore, we believe that before new law is needed, the existing laws need to be vigorously enforced.

What's next?

Behind all of the media, the hype, the emotional rhetoric sits a real problem: How do we bring real relief to the U.S. consumers that are not interested in unsolicited calls? As an association, and a member of industry, I can assure you that we have wrestled with this question a great deal. Like most others that come before this Committee, I am going to say that we would like to work with both Congress and the federal agencies involved to craft an intelligent framework for going forward. And like most others that come before this Committee, I expect that you would like me to be specific.

Although I cannot propose today a comprehensive set of self-regulation guidelines, I can outline areas in which all interested parties should begin to dialog towards policy that makes sense. Although the emotions are running high, and there is pressure to move quickly, we owe it to all interested parties to take our time, and move appropriately instead of in haste. The industry is in enthusiastic favor of good policy, and doubts that such policy for a complicated issue can be developed overnight. We do not want to be party to falsely creating unfair consumer expectations again, as has occurred in the recent past through poorly developed regulatory agency policy.

Clearly as a practical matter, we need to enforce the laws that have already been written, and

educate consumers to make use of the company specific do not call lists. Secondly, it is only fair to seek voluntary and publicized use of the existing rules by bodies that are currently exempted in the regulations like charities and politicians. Any voluntary or legislative actions should be supported by sufficient economic impact studies that weigh the interests of all involved. Finally, we should apply intelligence to other issues like calling frequency and persistence beyond someone's adamant statements of disinterest to create a healthier environment for the productive calling that takes place. We should all recognize that a complicated issue such as this requires study, consideration, and active participation as opposed to autocratic and capricious policy. Vilifying the hardworking people of the teleservices industry is not the right solution, but with your help we are interested in finding a better way.

In conclusion, I recognize that as Senators you are engaged in truly important issues related to our men and women overseas, our economy, and our domestic security. It is gratifying to know that you are willing to adjust your schedules to listen to the important issues related to this segment of U.S. commerce. Thank you for your time, and Mr. Chairman, thank you for letting me share with you the views of the telemarketing industry

* The *Richmond Journal of Law & Technology* has not verified the accuracy of these remarks.

** Mr. Searcy is the Executive Director of the American Teleservices Association.